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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CHINESE YELLOW PAGES, INC. et al., Plaintiffs and Respondents, v. CHINESE OVERSEAS MARKETING SERVICE CORP. et al., Defendants and Appellants.	B160260 (Super. Ct. No. BC270115)

APPEAL from an order of the Superior Court of Los Angeles County. Elizabeth A. Grimes, Judge. Affirmed.

Michael C. Olson for Defendants and Appellants.

McDermott, Will & Emery, James T. Grant, and Terrence P. Mann for Plaintiffs and Respondents.

I. INTRODUCTION

Defendants, Chinese Overseas Marketing Service Corporation (Overseas) and Alan Kao, appeal from an order denying their special motion to strike the complaint of plaintiffs, Chinese Yellow Pages, Inc. (the corporation) and Chinese Yellow Pages, L.P. (the partnership). (Code Civ. Proc.,[1] § 425.16.) We conclude defendants failed to meet their initial burden on the special motion to strike. Specifically, despite the opportunity to do so, defendants failed to present sufficient evidence their actions, which serve as the basis of the present lawsuit, arose out of protected conduct within the meaning of section 425.16, subdivision (e). Accordingly, we affirm the order.

II. BACKGROUND

Plaintiffs and Overseas are competing publishers of annual Chinese-language yellow-pages directories. Each finances its publication through fees paid by advertisers. A substantial number of entities place advertisements in both directories.

In November 1999, Overseas sued the corporation. In the prior lawsuit, Overseas alleged the corporation misrepresented the publication volume of its 1999 directory. Overseas asserted causes of action for unfair competition and false advertising. The corporation filed a cross-complaint against Overseas. The matter was eventually settled. The October 27, 2000, written settlement agreement provided in part, "This Agreement is a compromise of the above-mentioned lawsuit and shall not at any time be treated as an admission of liability by any party hereto for any purpose whatsoever." The corporation also stipulated to the entry of a permanent injunction against false advertising relating to the publication volume of its future directories. The stipulated judgment was entered in on January 26, 2001.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

In the present case, plaintiffs allege that following entry of the January 26, 2001, judgment, defendants made two misrepresentations. The first misrepresentation was that the corporation had ordered only 80,000 copies of the 1999 directory from the printer, GTE Directories. The corporation had promised to its customers to publish at least 100,800 copies of its directory. The second misrepresentation was that the corporation was required by the January 26, 2001, stipulated judgment to refund advertising fees to its 1999 advertisers. These misrepresentations were made to the Southern California Chinese community and to plaintiffs' advertisers. The misrepresentations were made through articles placed in Chinese language newspapers and direct notices sent to plaintiffs' advertisers. The purpose of the misrepresentations was to drive plaintiffs out of business. Thus Overseas and Mr. Kao would have a monopoly power in the Southern California marketplace which would allow them to raise their advertising fees in future directories. Plaintiffs alleged: breach of the settlement agreement; intentional interference with contractual relations with their advertisers; intentional interference with prospective economic advantage; and unfair competition. (Bus. & Prof. Code, § 17200 et seq.)

Defendants filed a special motion to strike pursuant to section 425.16. Defendants asserted plaintiffs' complaint was filed in retaliation for their successful prosecution of the prior action which resulted in the January 26, 2001, stipulated judgment. Defendants presented evidence through Mr. Kao's declaration. Mr. Kao related that from June 5, through June 18, 2001, one of the plaintiffs, the corporation, had "placed numerous and repetitive advertisements in the primary local Chinese newspaper, Chinese Daily News." Advertisements placed in the Chinese Daily News on June 5, and 6, 2001, by plaintiffs and signed by Tsung Chin Wu, the publisher of the Chinese Yellow Pages stated: Peter Hwu, an attorney for Overseas, had placed an advertisement which attacked the reputation of Chinese Yellow Pages; Chinese Yellow Pages had been published since 1983; Chinese Yellow Pages were published in six major cities; 300,000 copies of Chinese Yellow Pages will be published; "'Chinese Yellow Pages' is indeed the industry leader"; and Chinese Yellow Pages had received awards three times from the U.S.

Yellow Pages Publisher Association. Mr. Wu challenged "our competitor" to provide "comparable evidence" and promised that in the future, "[W]e will give all our customers a surprise." Mr. Wu concluded: "Chinese Yellow Pages is very sorry about the confusion this matter has caused the business community. As we continue to provide you with our best service, we invite all our advertisers' continued support and encouragement."

On June 9, 2001, plaintiffs placed another advertisement in the Chinese Daily News in the form of an open letter signed by Mr. Wu which stated the Chinese Yellow Pages: was published in "six major U.S. cities"; had an estimated circulation of 300,000 copies; had used its trademark to publish in other cities; and was the "leader in this industry." An additional 100,000 English-language telephone books were published in Northern California. Mr. Wu's open letter also identified eight unique services it provides to Chinese communities throughout the United States and responded to allegations it had not distributed 100,000 telephone directories in 1999. In essence, Mr. Wu explained that General Telephone Directories Company, a supplier, had failed to provide sufficient paper for a 100,000 telephone directory printing. Mr. Wu wrote that plaintiffs had paid for the paper to print 100,000 copies, but General Telephone Directories Company had failed to provide a sufficient quantity of printing stock. Mr. Wu noted that in 1997, 1998, 2000, and 2001, plaintiffs had printed 100,000 copies of their Chinese language telephone directory. Additionally, Mr. Wu noted that "our competitor" had never provided publishing information concerning its Northern or Southern California edition to the U. S. Yellow Pages Publishers Association while plaintiffs had done so. Moreover, Mr. Wu stated, "I would further ask our competitor to provide 'truthful' publishing information to the Yellow Pages Publishers Association, so it can be made available to the general public."

In the June 9, 2001, advertisement, Mr. Wu described the permanent injunction as follows: "With regard to the permanent injunction awarded by the court and circulated by our competitor during Chinese Yellow Pages' advertising period, I believe the general public have the right to know the truth of this matter: After Chinese Yellow Pages and its

competitor sued each other, the court assigned an arbitrator, who had the two parties sign a settlement agreement. This injunction is only a portion of the settlement agreement. This injunction asks Chinese Yellow Pages to abide by U.S. laws and regulations while conducting its business. Chinese Yellow Pages would of course sign it since all along we have been conducting our business in an honest, prudent and responsible manner. The most important thing in doing business is to protect your reputation. I, in fact, deeply believe all telephone book publishers should subject themselves to the highest business ethical standard."

The June 9, 2001, advertisement in the Chinese Daily News concluded with an apology that "'incomplete'" information had confused plaintiffs' clients in Southern California. Mr. Wu noted that the 2002 edition of the Southern California Chinese Yellow Pages would be its twentieth anniversary. The letter concluded: "To celebrate our 20th anniversary, we have a surprise for all our clients. Please look forward to it. We are proud of what we have achieved, and will keep up our good work to win your continued trust and support. [¶] On behalf of the entire Chinese Yellow Pages staff, I would like to thank you for spending time to read this letter."

On June 14, 15, and 18, 2001, plaintiffs submitted another advertisement which was printed in the Chinese Daily News. The advertisement alleged false advertising by Chinese Consumer Yellow Pages. The advertisement referred to contradictory claims Chinese Consumer Yellow Pages had made concerning its circulation. Additionally, the advertisement requested on behalf of Chinese Yellow Pages that Chinese Consumer Yellow Pages make public its contract with its printer and invoices for the 1997 Southern California edition so that the number of directory copies actually printed could be verified.

Mr. Kao related that Overseas had provided copies of the January 26, 2001, stipulated judgment to its customers. Both plaintiffs and Overseas shared common customers. Further, Mr. Kao's declaration stated that Overseas had received "numerous inquiries" from its customers. Mr. Kao stated, "To minimize any confusion and since the documents are a matter of public record, we provided copies of the court documents and

subpoenaed documents to our customers only." According to Mr. Kao, the documents were provided to the corporation's customers in order to minimize confusion.

The trial court found defendants had not met their initial burden on the special motion to strike. Accordingly, the trial court denied the special motion to strike. Defendants filed a timely notice of appeal.

III. DISCUSSION

A. Section 425.16

A special motion to strike may be filed in response to "'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.'" (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783, quoting *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815, fn. 2, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) Section 425.16, which was enacted in 1992, authorizes a court to summarily dismiss such meritless suits. (Stats. 1992, ch. 726, § 2, pp. 3523-3524.) The purpose of the statute is set forth in section 425.16, subdivision (a), as follows: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. . . ." Under section 425.16, any cause of action against a person "arising from any act . . . in furtherance of the . . . right of petition or free speech . . . ," in connection with a public issue must be stricken unless the court finds a "probability" that the plaintiff will prevail on whatever claim is involved. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 58; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1415.)

When a special motion to strike is made, the trial court must consider two components. First, the court must consider whether the moving defendant has carried its burden of showing that the lawsuit falls within the purview of section 425.16, i.e., arises from protected activity. The moving defendant has the initial burden of establishing a prima facie case that plaintiff's cause of action arises out of defendant's actions in the furtherance of petition or free speech rights. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721, overruled on another point in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. 10.) The moving defendant has no obligation to demonstrate that the plaintiff's subjective intent was to chill the exercise of constitutional speech or petition rights. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88; *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 66.) Nor must a defendant show that the action had the effect of chilling free speech or petition rights. (*Navellier v. Sletten, supra,* 29 Cal.4th at p. 88; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 75.)

Second, once the defendant meets this burden, the obligation shifts to the plaintiff to establish a probability that he or she will prevail on the merits. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67; *Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at p. 1115.) As to the second step of the weighing process, the Supreme Court in *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, described the trial judge's duties as follows: "In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.]" (Original italics; see *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1365, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 68, fn. 5.)

Section 425.16, subdivision (e), defines acts in furtherance of free speech or petition rights in connection with a public issue by setting forth four categories of conduct to which the statute applies. Section 425.16, subdivision (e) provides: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." The Supreme Court has held that a specific public issue showing is required only for acts claimed to fall under section 425.16, subdivisions (e)(3) and (e)(4). (*Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at pp. 1111-1123; *Du Charme v. International Brotherhood of Electrical Workers, Local 45* (2003) 110 Cal.App.4th 107, 113.) As the Court of Appeal explained in *Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal.App.4th 595, 600-601, "When the defendant's alleged acts fall under the first two prongs of section 425.16, subdivision (e) (speech or petitioning before a legislative, executive, judicial, or other official proceeding, or statements made in connection with an issue under review or consideration by an official body), the defendant is not required to independently demonstrate that the matter is a 'public issue' within the statute's meaning. (*Briggs v. Eden Council for Hope & Opportunity[, supra,]* 19 Cal.4th [at p.] 1113 [].) If, however, the defendant's alleged acts fall under the third or fourth prongs of subdivision (e), there is an express 'issue of public interest' limitation. ([*Id.*] at p. 1117.)" If a matter of public interest is not at issue, section 425.16, subdivisions (e)(3) and (e)(4) do not apply. (*Commonwealth Energy*

Corp. v. Investor Data Exchange, Inc. (2003) 110 Cal.App.4th 26, 32; *Consumer Justice Center v. Trimedica International, Inc., supra,* 107 Cal.App.4th at p. 600.)

Our review is de novo. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906; *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929.) We independently determine whether defendants have met their initial burden. Further, if that occurs, we also independently review whether plaintiffs have shown a probability of prevailing on the merits. (*Kashian v. Harriman, supra,* 98 Cal.App.4th at p. 906; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.) Plaintiffs and defendants each filed objections to the other's evidence filed in connection with the special motion to strike. However, counsel failed to secure a ruling on those objections in the trial court. As a result, all objections have been waived. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1.)

B. Application to the Present Case

1. Defendant's Burden

As discussed above, defendants' burden was to demonstrate that the causes of action arose out of the exercise of *their* petition or free speech rights. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara, supra,* 65 Cal.App.4th at p. 721.) Neither the statutory language nor the decisional authority is clear as to whether a defendant must present evidence in order to meet its burden or if the moving party may rely solely on the allegations of the complaint. In some but not all cases, it may appear from the pleading that the causes of action arise out of protected activity. Section 425.16 states in relevant part, "(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special

motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. [¶] (2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." The Supreme Court has commented that "section 425.16 requires every defendant seeking its protection to demonstrate that the subject cause of action is in fact one 'arising from' the defendant's protected speech or petitioning activity," a requirement that "is not always easily met." (*Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 66.) In *Wilcox v. Superior Court, supra,* 27 Cal.App.4th at page 821, the Court of Appeal stated, "[T]raditional pleading-based motions such as demurrers and motions to strike are ineffective in combating SLAPPs [(strategic lawsuits against public participation)] and [therefore] the Legislature believed there was a need for a 'special motion to strike' as authorized by section 425.16. In a SLAPP complaint the defendant's act of petitioning the government is made to appear as defamation, interference with business relations, restraint of trade and the like. For this reason the Legislature provided, in determining a motion under the anti-SLAPP statute, 'the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b).)" The weight of decision in the Courts of Appeal appears to be that a defendant must make an evidentiary showing in meeting its burden. In *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 656, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at page 68, footnote 5, the Court of Appeal held, "[T]he pleadings merely frame the issues to be decided." In *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073, the Court of Appeal held, "Unlike demurrers or motions to strike, which are designed to eliminate sham or facially meritless allegations, at the *pleading* stage, a [section 425.16] motion, like a summary judgment motion, *pierces* the pleadings and requires an evidentiary showing. As we observed in *Kyle v. Carmon* (1999) 71 Cal.App.4th 901 [], the test applied to a [section 425.16] motion is similar to that of a motion for summary judgment, nonsuit, or directed verdict. ([*Id.* at pp. 907-908.]) Evidence is considered, but not

weighed. If the initial evidentiary burden is met by the moving party, the burden shifts to the party opposing the motion to avoid dismissal of the action. (*Church of Scientology v. Wollersheim*[*, supra,*] 42 Cal.App.4th [at p.] 646 [] . . . .)" (Original italics.) Other Court of Appeal decisions are to the same general effect. (See *Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 613 [defendant must make a "prima facie showing"]; *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 868 [evidence moving party presented did not amount to required prima facie showing]; *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087 [defendant must "make a prima facie showing"]; *Paul for Council v. Hanyecz, supra,* 85 Cal.App.4th at p. 1365 [defendant "must present a prima facie showing" of facts]; *Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 674 [substantial evidence supported finding defendant's conduct was in furtherance of free speech right]; *Church of Scientology v. Wollersheim, supra,* 42 Cal.App.4th at p. 646 [moving party must establish "a prima facie showing"].) We follow the apparent weight of authority in holding that a defendant's initial burden on a section 425.16 motion is an evidentiary burden.

2. Section 425.16, subdivisions (e)(1) and (e)(2)

Defendants contend they communicated with customers concerning the possibility of the advertisers suing plaintiffs for refunds of advertising fees. Defendants assert a class action was subsequently brought against plaintiffs by advertisers seeking refunds. Therefore, defendants conclude, their conduct falls within the purview of section 425.16, subdivisions (e)(1) and (e)(2). We disagree.

As noted above, section 425.16, subdivision (e) provides in part: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral

statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . ." No specific public interest showing is required for acts claimed to fall under those subdivisions. (*Briggs. v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at pp. 1111-1123; *Du Charme v. International Brotherhood of Electrical Workers, Local 45, supra,* 110 Cal.App.4th at p. 111.) As the Supreme Court explained in *Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at page 1113, "[S]ection 425.16 encompass[] any cause of action against a person arising from any statement or writing made in, or in connection with an issue under consideration or review by, an official proceeding or body." It is undisputed defendants' statements at issue were not made in or before any official proceeding. Therefore section 425.16, subdivision (e)(1) is inapplicable by its terms. (E.g., *Paul v. Friedman, supra,* 95 Cal.App.4th at p. 865.)

Nor were defendants' statements made in connection with an issue "under consideration or review" by an official proceeding. (§ 425.16, subd. (e)(2).) Defendants' statements and writings giving rise to the present action were made in connection with the prior action; a lawsuit that was final. At the time defendants engaged in the conduct at issue, the prior action had been finally concluded. It had been settled. It was no longer under consideration in a judicial proceeding. Therefore, section 425.16, subdivision (e)(2) is also inapplicable. (*Paul v. Friedman, supra,* 95 Cal.App.4th at pp. 866-867; *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280, 285.)

Defendants cite *Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at page 1120, and *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, supra,* 47 Cal.App.4th at page 784, for the proposition that section 425.16, subdivisions (e)(1) and (e)(2) extend to statements made in anticipation of bringing an action. In *Briggs,* the statements in question were made by representatives of a nonprofit corporation that counseled tenants and mediated landlord-tenant disputes—the Eden Council for Hope and Opportunity, the defendant. The statements were made in connection with assisting a tenant to file a complaint with the federal Department of Housing and Urban

Development and assisting tenants in prosecuting small claims court actions. Other statements were made in the course of a Department of Housing and Urban Development investigation. (*Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at pp. 1109-1110, 1114-1115.) The Supreme Court concluded, "'Just as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], . . . such statements are equally entitled to the benefits of section 425.16.' [Citations.]" (*Id.* at p. 1115.) Similarly, in *Dove Audio, Inc.,* Audrey Hepburn's son asked a law firm to look into royalty payments that were supposed to have gone to a charity. After obtaining the support of other celebrities who had participated in the underlying endeavor, Ms. Hepburn's son requested an investigation by the proper government authorities. (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, supra,* 47 Cal.App.4th at p. 780.) The statements at issue were made by the law firm in letters to celebrities who had indicated their support of the anticipated investigation. (*Id.* at pp. 780, 783-785.) The Court of Appeal held the communications, made in connection with a proposed complaint to the Attorney General seeking an investigation, fell within section 425.16, subdivision (e)(2).

Defendants have not made a similar showing in this case. Defendants did not present any evidence that any of the statements giving rise to this lawsuit were made in anticipation of or preparatory to a judicial or other official proceeding. They have not shown they were soliciting support for a request for official action, as was the situation in *Dove Audio, Inc.,* or that any official proceeding was contemplated, as was the case in *Briggs*. Therefore, defendants have not established that plaintiffs' claims arise out of statements or writings before or in connection with a matter under review by a legislative, executive, judicial, or other official proceeding, or in anticipation of any such event. Section 425.16, subdivision (e)(2) are inapplicable.

3. Section 425.16, subdivision (e)(3)

Pursuant to section 425.16, subdivision (e)(3): "[An] 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: [¶] . . . [¶] (3) any written or oral statement or writing made *in a place open to the public or a public forum* in connection with an issue of public interest; . . . ." (Italics added.) Defendants contend they communicated through the Chinese Daily News, by mail, and in private conversations, all of which are public forums within the meaning of section 425.16. However, defendants did not present any specific evidence as to the content of their communications or the manner in which they were made. Defendants' evidence showed only that from June 5, 2001, through June 18, 2001, *plaintiffs* had "placed numerous and repetitive advertisements in the primary local Chinese newspaper, Chinese Daily News"; further, defendants had "*distributed* a copy of the injunction and public documents to [their] customers . . . [,]"; and had "*provided* copies of the court documents and subpoenaed documents" to customers. (Italics added.) Further, defendants did not present any probative evidence the statements giving rise to the present action were made *in a place open to the public or a public forum*. (§ 425.16, subd. (e)(3).) In the absence of any such evidence, we cannot conclude that section 425.16, subdivision (e)(3) applies.

4. Section 425.16, subdivision (e)(4)

Section 425.16, subdivision (e)(4) provides, "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: [¶] . . . [¶] (4) or *any other conduct* in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Italics added.) The statutory language "any other conduct" strongly suggests the Legislature meant conduct other than that specified in the three preceding

subsections—"any written or oral statement or writing." (§ 425.16, subds. (e)(1), (e)(2), & (e)(3).) Legislative history materials bear that suggestion out. Section 425.16, subdivision (e)(4) was added in 1997. (Stats. 1997, ch. 271, § 1.) The 1997 enactment was to clarify that the constitutional rights of free speech and petition, which section 425.16 seeks to protect, include "constitutionally protected expressive conduct." (Sen. Jud. Com., Analysis of Sen. Bill No. 1296 (1997-1998 Reg. Sess.) as amended May 12, 1997.) A Senate Judiciary Committee analysis of Senate Bill No. 1296 states in part: "Proponents assert that the constitutional right of free speech and petition also includes constitutionally protected expressive conduct. This facet of First Amendment jurisprudence was recognized in *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, which held that the protections of Section 425.16 applies to both 'communicative conduct' and 'noncommunicative conduct.' (*Id.* at pp. 18-20.) [¶] This bill would reflect that law and specifically apply the provisions of Section 425.16 to 'any other conduct in furtherance of the constitutional right of petition or of free speech in connection with a public issue or an issue of public interest.' [¶] The proposed phraseology ('any other conduct') would appear to limit the provision to 'conduct' when that phrase is compared to categories (1), (2), and (3) which refers exclusively to 'written or oral statements or writings.'" (Sen. Jud. Com., Analysis of Sen. Bill No. 1296 (1997-1998 Reg. Sess.) as amended May 12, 1997; see also Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1296 (1997-1998 Reg. Sess.) as amended May 12, 1997; Sen. Rules Com., Off. of Sen. Floor Analyses, unfinished business analysis of Sen. Bill No. 1296 (1997-1998 Reg. Sess.) as amended June 23, 1997.) Similarly, an Assembly Committee on Judiciary analysis of the bill states in part: "Regarding the statute's reach into constitutionally protected 'conduct' as well as statements, the bill comports with the reasoning of the court in the recent case of *Ludwig v. Superior Court[, supra,]* 37 Cal.App.4th 8, which held that Section 425.16's protections apply to *both* of these basis forms of protected communication." (Assem. Com. on Jud., Analysis of Sen. Bill No. 1296 (1997-1998 Reg. Sess.) as amended

June 23, 1997, p. 4; accord, Sen. 3d reading analysis of Sen. Bill No. 1296 (1997-1998 Reg. Sess.) as amended June 23, 1997, p. 2.)

In *Ludwig v. Superior Court, supra,* 37 Cal.App.4th at pages 18-20, the case cited in the analysis, the defendant argued section 425.16 only protects communicative conduct. The Court of Appeal for the Fourth Appellate District disagreed. The court held, "[S]ection 425.16 . . . extends to '*any* act . . . in furtherance of the . . . right [to] petition . . . .'" including other than oral or written statements. (*Id.* at p. 19; see also Corby, *Clearing Up Civil Procedure Section 425.16—Delivering the Final Knockout Punch to SLAPP Suits* (1998) 29 McGeorge L.Rev. 459, 465 & fn. 57 ["the statute is no longer limited to just acts that are written or oral"].) Given the statutory language and the clear legislative intent, section 425.16, subdivision (e)(4) refers to constitutionally protected expressive conduct. Here, defendants do not assert, and have not presented any evidence to the effect that, they engaged in any such conduct. Plaintiffs' causes of action rest on statements made by defendants. Accordingly, section 425.16, subdivision (e)(4) is inapplicable.

C. Conclusion

Defendants failed to meet their initial burden of showing that this lawsuit arises from protected activity on their part and therefore falls within the purview of section 425.16. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara, supra,* 65 Cal.App.4th at p. 721.) Defendants presented no meaningful evidence as to the manner in which they "distributed" or "provided" information to customers or the specific content of those communications much less than this occurred as part of an official proceeding or in anticipation of such. Because defendants failed to meet their initial burden on the motion, we need not consider whether plaintiffs established a probability that they would prevail on the merits. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67; *Briggs v. Eden Council for Hope &*

Opportunity, supra, 19 Cal.4th at p. 1115.) The trial court properly denied defendants' special motion to strike.

IV. DISPOSITION

The order denying the special motion to strike is affirmed. Plaintiffs, Chinese Yellow Pages, Inc. and Chinese Yellow Pages, L.P., are to recover their costs on appeal from defendants, Chinese Overseas Marketing Service Corporation and Alan Kao.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

GRIGNON, J.

ARMSTRONG, J.